(9)

DEC 23 1997

No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General?

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No. 96-8986

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals denying petitioner's application for a certificate of appealability (J.A. 41-48) is reported at 99 F.3d 892.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1996. A petition for rehearing was denied on February 10, 1997. The petition for a writ of certiorari was filed on May 12, 1997, and invoked this Court's jurisdiction under 28 U.S.C. 1254(1). The petition for a writ of certiorari was granted on October 31, 1997, limited to the following question: "In light of the fact that the Court of Appeals denied the peti-

tioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the * * * Solicitor General?" (118 S. Ct. 361). The jurisdiction of this Court rests on either 28 U.S.C. 1254(1) or 28 U.S.C. 1651(a).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant statutory provisions, Federal Rules and Supreme Court Rules are reproduced at App., *infra*, 1a-8a.

STATEMENT

1. On June 20, 1990, police officers executed a search warrant at petitioner's house. The police recovered approximately 16 grams of methamphetamine, most of which was in a brown case on the kitchen counter. Within arm's reach of the drugs on the kitchen counter, police found three loaded firearms, two of them in holsters. During the search, the police also found a grinder bearing methamphetamine residue, three other firearms, one of which was loaded, and $293 in currency. J.A. 34, 43; Gov't C.A. Br. in Opp. to Pet. for Rehearing 2. Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of, *inter alia*, using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). J.A. 27. Petitioner appealed but did not challenge the sufficiency of the evidence to support his conviction under Section 924(c)(1). The court of appeals affirmed. J.A. 12-26.

2. a. On December 6, 1995, this Court held in *Bailey* v. *United States*, 516 U.S. 137, that a conviction for use of a firearm under Section 924(c)(1) requires the government to "show active employment of

the firearm." *Id.* at 144. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. *Id.* at 148. By contrast, mere possession of a firearm does not constitute "use." *Id.* at 149.

b. Following the decision in *Bailey*, petitioner filed a pro se motion seeking to vacate his sentence under 28 U.S.C. 2255 on two grounds. First, he contended that the evidence at his trial was insufficient under *Bailey* to support his conviction under Section 924(c)(1). Petitioner contended that his failure to raise the insufficiency claim on direct appeal should be excused because his conduct "was not a crime," and it would therefore be a "fundamental miscarriage of justice" not to review his claim. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, at 8. Second, petitioner challenged the jury instructions at his trial for improperly defining the phrase "use a firearm" and argued that correct jury instructions would likely have produced an acquittal. *Id.* at 11. The government responded that petitioner was not entitled to relief because the evidence at trial was sufficient to show that he had "carried" a firearm. Noting that the police found weapons in holsters next to large amounts of methamphetamine on the counter in petitioner's kitchen, the government argued that the jury could infer that petitioner had "entered his residence and placed his belongings, which included the methamphetamine and firearms, onto the counter." J.A. 34-35. The government acknowledged that, under *Bailey*, the jury instructions at petitioner's trial erroneously defined the word "use," but contended that the error was harmless because "[t]he evidence obviously establishes 'carry-

ing.'" J.A. 35. The district court held that petitioner had "waived" his *Bailey* claim by failing to raise it on direct appeal. J.A. 37-38.[1]

3. a. On April 24, 1996, while petitioner's Section 2255 motion was pending in the district court, the President signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Title I of the AEDPA made changes to the law governing collateral attacks for federal prisoners making Section 2255 motions and state prisoners seeking habeas corpus relief under 28 U.S.C. 2254. Before the passage of the Act, a state prisoner was required to secure a certificate of probable cause authorizing an appeal from the district court's denial of his habeas petition, but no similar requirement was imposed on a federal prisoner seeking to appeal the denial of his Section 2255 motion. See 28 U.S.C. 2253 (1994). Section 102 of the AEDPA amended Section 2253 to require both federal and state prisoners to obtain a "certificate of appealability" as a condition of appealing. The new provision states that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * (A) the final

[1] The court relied on *United States* v. *McKinney*, 79 F.3d 105, 109 (1996), in which the Eighth Circuit held that a defendant who had not raised a *Bailey* claim at trial or in his initial brief on direct appeal had waived it. This Court subsequently vacated and remanded *McKinney* for further consideration in light of *Johnson* v. *United States*, 117 S. Ct. 1544 (1997). *McKinney* v. *United States*, 117 S. Ct. 1816 (1997). On remand in *McKinney*, the Eighth Circuit applied plain error analysis rather than the waiver theory on which the district court in this case had relied. *United States* v. *McKinney*, 120 F.3d 132 (1997).

order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996).

b. On July 29, 1996, petitioner filed a notice of appeal from the district court's decision denying his motion. J.A. 40. The court of appeals treated the notice of appeal as an application for a certificate of appealability. J.A. 1, 4, 41. The case was docketed in the court of appeals as No. 96-3118, and the record was transferred to the court of appeals from the district court. J.A. 3, 4. The court of appeals referred the application to a panel consisting of three circuit judges. J.A. 4.

The panel of the court of appeals denied petitioner a certificate of appealability, concluding that he had not made a "substantial showing of the denial of a constitutional right." J.A. 41-42. The court reasoned that, because petitioner's claim relies on *Bailey*, "petitioner is not making a constitutional claim. He is making a claim to a federal statutory right." J.A. 42. Because "*Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution," the court of appeals denied a certificate of appealability. *Ibid.*

Judge McMillian dissented. J.A. 42-48. After noting that courts have granted post-conviction relief following a change in the law, the dissent stated that "a judgment in a criminal case in which the prosecution has offered and the record discloses no proof

whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law." J.A. 47 (quoting *United States* v. *Liguori*, 438 F.2d 663, 669 (2d Cir. 1971)). The dissent also believed that petitioner had "cause" for failing to challenge the jury instructions on appeal "[b]ecause *Bailey* represents such a clear break with precedent regarding the definition of 'use' under § 924(c)(1)." J.A. 48. Accordingly, the dissent concluded that this case presented a "substantial showing of the denial of a constitutional right." *Ibid.*

c. Petitioner sought rehearing, with a suggestion for rehearing en banc. In opposing further review, the government took the position that the panel's decision was correct. The full court of appeals denied rehearing en banc, with Judges McMillian, Beam, Loken, and Hansen dissenting. J.A. 49.

4. On May 12, 1997, petitioner filed a petition for a writ of certiorari in this Court, invoking the Court's jurisdiction under 28 U.S.C. 1254(1). The petition sought review of the court of appeals' holding that petitioner was not entitled to a certificate of appealability because his claim—that he is presently incarcerated for conduct that, under *Bailey*, is not criminal—raises a statutory, not a constitutional, issue. The government filed a brief in response, agreeing that claims of the kind raised by petitioner in his motion under Section 2255 may fairly be characterized as "constitutional," and that the court of appeals erred in concluding otherwise. The government suggested that the judgment of the court of appeals should be vacated and the case remanded for further consideration whether a certificate of appealability should issue. Gov't Br. in Resp. 7, 15.

On October 31, 1997, the Court granted certiorari limited to the question whether, in light of the fact that the court of appeals denied petitioner's request for a certificate of appealability, the Court has jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General. The Court invited Jeffrey S. Sutton, Esquire, of Columbus, Ohio, to brief and argue this case, as amicus curiae, against the Court's jurisdiction. J.A. 50.

SUMMARY OF ARGUMENT

This Court has jurisdiction under the All Writs Act to grant a common-law writ of certiorari to review the court of appeals' denial of petitioner's application for a certificate of appealability, vacate the judgment of the court of appeals, and remand for further consideration whether a certificate should issue. The Court first held in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), that it had jurisdiction to review the denial of an application for a certificate of probable cause—the predecessor and functional equivalent of a certificate of appealability. The Court has exercised certiorari jurisdiction in that context at least 14 times since *House*.

The Court's jurisdiction was not affected by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. In the AEDPA, Congress extended to Section 2255 motions filed by federal prisoners, such as petitioner, the requirement that state prisoners petitioning for habeas corpus under 28 U.S.C. 2254 must obtain a certificate authorizing appeal before they may appeal the denial of their petitions. Congress thus eliminated prisoners' appeals as of right from denials of Section 2255 motions. Congress did not, however,

limit this Court's discretion to review by writ of certiorari the denial of an application for a certificate of appealability.

There are two possible bases for the Court's power to review denials of certificates of appealability—the statutory certiorari jurisdiction under 28 U.S.C. 1254(1) and the authority to issue common-law writs of certiorari under the All Writs Act, 28 U.S.C. 1651(a). The Court lacks jurisdiction under Section 1254(1) to review the merits of an underlying Section 2255 motion until a certificate of appealability has issued. Absent a certificate, a court of appeals lacks jurisdiction to review the merits of a Section 2255 motion, and the motion is therefore not "in" the court of appeals within the meaning of Section 1254(1). The Court arguably has jurisdiction under Section 1254(1), however, to review the denial by a court of appeals of an application for a certificate of appealability. Applications for certificates of appealability, which the courts of appeals have jurisdiction to decide under 28 U.S.C. 2253(c) (Supp. II 1996), see *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam), could be viewed as "cases in the courts of appeals."

Nonetheless, jurisdiction under Section 1254(1) appears to be foreclosed by this Court's precedent. See, *e.g.*, *House* v. *Mayo*, *supra*. On the assumption that jurisdiction is unavailable under Section 1254(1), however, this Court's precedent makes it clear that the Court has jurisdiction to review the denial of a certificate in petitioner's case by a common-law writ of certiorari under the All Writs Act.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW BY COMMON-LAW WRIT OF CERTIORARI THE ORDER OF THE COURT OF APPEALS DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

This Court's jurisdiction to review the denial by a court of appeals of a certificate authorizing appeal from a decision on collateral review was explored most recently in an exchange of opinions between Justices Rehnquist and Stevens in *Davis* v. *Jacobs*, 454 U.S. 911 (1981). Justice Stevens contended that this Court's jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to review denials of certificates was settled in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam). See 454 U.S. at 912-914 (Stevens, J., respecting the denial of certiorari). Justice Rehnquist maintained that *House* was inconsistent with the principles governing the exercise of All Writs Act jurisdiction and with Congress's decision to make a certificate a prerequisite to appellate consideration of a petition for collateral review. See *id.* at 915-919 (Rehnquist, J., dissenting from the denial of certiorari); see also *Jeffries* v. *Barksdale*, 453 U.S. 914 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

In our view, *House* and later cases firmly establish this Court's jurisdiction under the All Writs Act to review a court of appeals' denial of a certificate granting leave to appeal a petition for habeas corpus under 28 U.S.C. 2254. That jurisdiction was not revoked when Congress in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, extended the certificate require-

ment to appeals from denials of Section 2255 motions, such as petitioner's. Although 28 U.S.C. 1254(1) could be read to provide jurisdiction to review the denial of a certificate, that reading of Section 1254(1) appears foreclosed by this Court's precedent, which instead bases jurisdiction on the All Writs Act. That use of the All Writs Act is fully consistent with the cases and principles defining the scope of this Court's jurisdiction under that Act.

A. The Court's Precedent Firmly Establishes Certiorari Jurisdiction To Review The Denial Of A Certificate Of Appealability, And That Jurisdiction Was Not Revoked By The AEDPA

1. In *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), this Court held that it had certiorari jurisdiction to review the denial of a certificate of probable cause—the predecessor and functional equivalent of a certificate of appealability. The Court has exercised certiorari jurisdiction in that context at least 14 times since *House*.

Since 1908, a state prisoner seeking to appeal a district court's denial of a petition for habeas corpus has been required first to secure a certificate of probable cause. See 28 U.S.C. 2253 (1994).[2] In *House*, the district court denied House's petition for habeas corpus

[2] Before enactment of the AEDPA, Section 2253 stated: "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." That requirement originated in the Act of March 10, 1908, ch. 76, 35 Stat. 40. The requirement was subsequently amended by the Act of February 13, 1925, ch. 229, §§ 6(d), 13, 43 Stat. 940, 942, and the Act of June 25, 1948, ch. 646, § 2253, 62 Stat. 967.

and declined to issue a certificate, and the court of appeals rejected his application to appeal in forma pauperis because House had not secured a certificate. 324 U.S. at 43-44. The court of appeals did not consider whether it should issue a certificate. *Id.* at 44. Holding that the court of appeals "erred in not considering whether the case was an appropriate one for a certificate of probable cause" and that the district court erred in denying the petition, this Court reversed both the court of appeals and the district court. *Id.* at 48. The Court stated that it did not have jurisdiction to take that action under 28 U.S.C. 347(a) (1940), the predecessor to Section 1254(1), but had jurisdiction to issue a common-law writ of certiorari under the All Writs Act (then codified at 28 U.S.C. 377 (1940)). 324 U.S. at 44; see page 21, *infra*.

At least 14 times since *House*, this Court has granted certiorari to review the decision of a court of appeals denying an application for a certificate of probable cause. See *Burwell* v. *Teets*, 350 U.S. 808, 809 (1955) (per curiam); *Rogers* v. *Teets*, 350 U.S. 809 (1955) (per curiam); *United States ex rel. Jennings* v. *Ragen*, 358 U.S. 276, 277 (1959) (per curiam); *In re Shuttlesworth*, 369 U.S. 35 (1962) (per curiam); *Maxwell* v. *Bishop*, 385 U.S. 650 (1967) (per curiam); *Walker* v. *Wainwright*, 390 U.S. 335, 336-337 (1968) (per curiam); *Conway* v. *California Adult Auth.*, 393 U.S. 1062 (order granting petition for certiorari), cert. dismissed, 396 U.S. 107, 109 (1969) (per curiam); *Humphrey* v. *Cady*, 401 U.S. 973 (1971) (order granting petition for certiorari), opinion issued, 405 U.S. 504, 506 (1972); *Smith* v. *Digmon*, 434 U.S. 332, 333-334 (1978) (per curiam); *Allen* v. *Hardy*, 478 U.S. 255, 257-258 (1986) (per curiam); *Graham* v. *Lynaugh*, 492 U.S. 915 (1989) (order granting petition for

certiorari, vacating the decision of the court of appeals, and remanding); *Selvage* v. *Lynaugh*, 493 U.S. 888, 889 (1989) (order granting petition for certiorari), opinion issued *sub nom. Selvage* v. *Collins*, 494 U.S. 108, 109-110 (1990) (per curiam); *Lozada* v. *Deeds*, 498 U.S. 430, 431 (1991) (per curiam); *Lynce* v. *Mathis*, 116 S. Ct. 1671 (1996) (order granting petition for certiorari), opinion issued, 117 S. Ct. 891, 893 (1997).[3] Thus, this Court's precedent firmly establishes its certiorari jurisdiction to review the denial by a court of appeals of an application for a certificate of probable cause.[4]

2. In 1996, Congress enacted the AEDPA, which extensively revised the law of post-conviction review. Before the AEDPA, federal prisoners were entitled to an appeal as of right on the merits of their Section 2255 motions. Section 102 of the AEDPA amended 28 U.S.C. 2253 to require both federal and state prisoners to obtain a "certificate of appealability"

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[3] The Court has also commented on questions certified to it by a court of appeals in which an application for a certificate was pending. *In re Burwell*, 350 U.S. 521, 522 (1956) (per curiam).

[4] The precedent also demonstrates that this Court has jurisdiction under the All Writs Act, in an appropriate case, to review the merits of an underlying Section 2255 motion, where the court of appeals erroneously failed to issue a certificate of appealability. See *House*, 324 U.S. at 44; cf. *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941) (reversing court of appeals' denial of leave to appeal in forma pauperis and reaching merits of appeal). It would be premature for the Court to review the merits of petitioner's Section 2255 motion at this time, however, for the reasons stated in our brief in response to the petition (at 9-10, 14-15). See also pages 32-34, *infra* (explaining that the Court should not itself issue petitioner a certificate of appealability).

as a condition to appeal. 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). The AEDPA thus extended to federal prisoners the requirement that a prisoner secure authorization before a court of appeals may review the merits of his Section 2255 motion and changed the name of the required authorization to a "certificate of appealability." The AEDPA made no changes, however, that can be interpreted to revoke the well established jurisdiction of the Supreme Court to review a denial by a court of appeals of a certificate.[5]

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[5] The revised provision states that, "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from * * * (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255." § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996). One difference between the revised provision and the prior version of Section 2253 (see note 2, *supra*) is that Congress deleted the explicit authorization for "the justice or judge who rendered the order" to issue a certificate. Several courts of appeals, however, have concluded that the reference to any "circuit justice or judge" includes district judges. See *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997); *United States* v. *Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997); *United States* v. *Eyer*, 113 F.3d 470, 473 (3d Cir. 1997); *Houchin* v. *Zavaras*, 107 F.3d 1465, 1468-1469 (10th Cir. 1997); *Lozada* v. *United States*, 107 F.3d 1011, 1016 (2d Cir. 1997), abrogated on other grounds by *United States* v. *Perez*, 129 F.3d 255 (2d Cir. 1997); *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997); *Else* v. *Johnson*, 104 F.3d 82, 83 (5th Cir. 1997); *Hunter* v. *United States*, 101 F.3d 1565, 1583-1584 (11th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1695 (1997); see also 1st Cir. R. 22.1(b); 7th Cir. R. 22.1(b); Fed. R. App. P. 22(b) (authorizing district judges to grant certificates). The AEDPA did make two other changes to Section 2253, but they are not relevant to the jurisdictional issue. First, the

Notably absent from the revised language of Section 2253 is a statement restricting this Court's certiorari jurisdiction to review decisions by the courts of appeals on applications for certificates. Congress is presumed to legislate with a full understanding of existing law, including this Court's precedents. See *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995); *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979). Thus, had Congress intended to revoke the firmly established jurisdiction of this Court, it would have done so expressly. Indeed, other provisions of the AEDPA demonstrate that, when Congress desires to limit the Court's certiorari power, it knows how to do so. The AEDPA amended 28 U.S.C. 2244 to create a new requirement that a court of appeals authorize the filing of a second or successive habeas corpus application. See § 106, 110 Stat. 1221, 28 U.S.C. 2244(b)(3)(A) (Supp. II 1996). Congress specifically provided that the "grant or denial of an authorization * * * shall not be appealable and shall not be the subject of a petition * * * for a writ of certiorari." *Ibid.*, 28 U.S.C. 2244(b)(3)(E) (Supp. II 1996). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The logical conclusion, therefore, is that Congress did not

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AEDPA codified the showing necessary to justify issuance of a certificate. § 102, 110 Stat. 1218, 28 U.S.C. 2253(c)(2) (Supp. II 1996). Second, it required that the certificate "indicate which specific issue or issues satisfy th[at] showing." *Ibid.*, 28 U.S.C. 2253(c)(3) (Supp. II 1996).

intend to restrict this Court's certiorari jurisdiction to review denials of applications for certificates of appealability. See *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2068 (1997) (reasoning that, because the AEDPA expressly provides that the new amendments regarding habeas proceedings in capital cases apply to pending cases, by negative implication the amendments in the noncapital context apply only to cases filed after enactment). See also *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338-2339 (1996) (noting this Court's hesitance to find that its jurisdiction has been repealed by implication and concluding that the AEDPA's preclusion of certiorari jurisdiction in Section 2244(b)(3)(E) did not restrict this Court's jurisdiction to entertain original writs of habeas corpus).

B. The Court's Precedent Supports Certiorari Jurisdiction Under The All Writs Act

1. There are two possible bases for the Court's jurisdiction to review denials of certificates of appealability. One possible basis is the Court's statutory certiorari power under 28 U.S.C. 1254(1), and the other is its power to issue common-law writs of certiorari under the All Writs Act, 28 U.S.C. 1651(a). Section 1254(1) authorizes the Court to grant certiorari to review "cases in the courts of appeals." Section 1651(a) authorizes the Court to grant "all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law."

A case is "in" the court of appeals within the meaning of Section 1254(1) only if the case is docketed and pending in the court of appeals. See *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934). In addition, this Court may review the merits of the case only if the court of appeals properly has jurisdiction to do so. See *Nixon* v. *Fitz-*

gerald, 457 U.S. 731, 742-743 & n.23 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974).[6] A court of appeals lacks jurisdiction to review the merits of a prisoner's Section 2255 motion unless the prisoner first obtains a certificate authorizing an appeal. See § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). Therefore, in the absence of a certificate of appealability, the Supreme Court lacks jurisdiction to issue a writ of certiorari under Section 1254(1) to review the merits of a Section 2255 motion even if the court of appeals has passed on the merits. See *McCarthy* v. *Harper*, 449 U.S. 1309, 1310 (1981) (Rehnquist, J., in chambers).

The Supreme Court might nonetheless have jurisdiction under Section 1254(1) to review the decision of a court of appeals on an application for a certificate of appealability. The Court explained in *In re Burwell*, 350 U.S. 521 (1956) (per curiam), that a court of appeals has jurisdiction under Section 2253 to pass on

[6] If there is a question whether the court of appeals has jurisdiction to review the merits of a case, this Court has jurisdiction to resolve that question. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23 (reversing court of appeals' dismissal for lack of jurisdiction and noting that "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction"); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 479 (1978) (affirming court of appeals' dismissal for lack of jurisdiction); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 370 (1981) (reversing court of appeals for improperly exercising jurisdiction); *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 740 (1976) (same).

an application for a certificate. *Id.* at 522.[7] Thus, an application, such as petitioner's, that has been dock-

[7] Nothing in the amendments to Section 2253 made by the AEDPA alters the conclusion in *In re Burwell*. The language that gives a court of appeals jurisdiction to issue a certificate was not changed. Compare § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) ("[u]nless a circuit justice or judge issues a certificate of appealability") with 28 U.S.C. 2253 (1952) ("unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause").

The language in both versions of Section 2253 could be read to give authority to issue a certificate to an individual judge rather than a court. In *In re Rogers*, 350 U.S. 521 n.* (1956), the companion case to *In re Burwell*, the Ninth Circuit contended that Section 2253 did not give jurisdiction to the court of appeals, "as a court," to rule on an application for a certificate of probable cause. See *In re Rogers*, On Certificate of Questions from the United States Court of Appeals for the Ninth Circuit at 8-10. This Court rejected the Ninth Circuit's argument and explained that the Court had held in *Burwell* v. *Teets*, *supra*, and *Rogers* v. *Teets*, *supra*, that Section 2253 gives the courts of appeals jurisdiction to issue certificates of probable cause. *In re Burwell*, 350 U.S. at 522. Despite the decision in *In re Burwell*, some confusion has persisted whether jurisdiction lies in a court of appeals as a "court" or as an assemblage of "judges." Compare Fed. R. App. P. 22(b) advisory committee's note (1967 adoption) (judges have jurisdiction) with *Ojeda Rios* v. *Wigen*, 863 F.2d 196, 200 n.3 (2d Cir. 1988) (Newman, J., in chambers) (calling Advisory Committee interpretation of *In re Burwell* "somewhat surprising" and maintaining court has jurisdiction). See also *Lara* v. *Nelson*, 449 F.2d 323, 324 (9th Cir. 1971) (citing Rule 22(b) and suggesting that judges, rather than court, have jurisdiction); *Ex parte Farrell*, 189 F.2d 540, 543 (1st Cir.) (suggesting court has jurisdiction), cert. denied, 342 U.S. 839 (1951). In any event, if Section 2253 does not give the courts of appeals jurisdiction to pass on an application for a certificate, they likely have that authority under the All Writs Act. See *Ojeda Rios*, 863 F.2d at 200 n.3.

eted in the court of appeals could be said to be properly "in the court[] of appeals." This Court would still not have jurisdiction to review the decision on the application, however, unless the application is a "case," distinct from the underlying Section 2255 motion.[8]

The Court's treatment of certain analogous matters may support the proposition that an application for a certificate of appealability is a "case" under Section 1254(1). For example, this Court has considered appeals from interlocutory orders to be "cases in the courts of appeals" under Section 1254(1). See *Nixon* v. *Fitzgerald*, 457 U.S. at 742 (rejecting argument that the appeal of an order denying immunity claim "was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of §1254"); *United States* v. *Nixon*, 418 U.S. at 692 (referring to the appeal of a denial of a motion to quash a subpoena as a "case * * * now properly before this Court on [a] writ of certiorari" under Section 1254(1)). The underlying damages action in *Nixon* v. *Fitzgerald*, 457 U.S. at 740-741, and criminal prosecution in *United States* v. *Nixon*, 418 U.S. at 687-688, had not yet gone to trial in the district court, and, like Section 2255 proceedings

[8] A similar issue may arise in *Stewart* v. *Martinez-Villareal*, No. 97-300 (to be argued Feb. 25, 1998), should the Court decide that 28 U.S.C. 2244(b)(3)(E) (Supp. II 1996) is not applicable to the facts of that case. In order to review the decision of the Ninth Circuit in *Stewart* under Section 1254(1), the Court would have to find that the proceedings in the court of appeals, in which the court dismissed as unnecessary a motion for authorization to file a second or successive habeas petition, constitute a "case[] in the court[] of appeals" under Section 1254.

in which a certificate of appealability has been denied, were not "in" the court of appeals.[9]

This Court has also apparently treated motions to intervene in cases pending in the courts of appeals as independent "cases" under Section 1254(1). Section 1254(1) permits only a "party to any civil or criminal case" to seek certiorari review. The Court has nonetheless allowed a litigant who has been refused intervention by the court of appeals to obtain review in this Court, but has stated that review extends only to the order denying the motion to intervene. See *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965). One explanation for that result is that the Court viewed the motion to intervene as a separate "case" to which the litigant was a "party."[10]

[9] The court of appeals exercised its ordinary appellate jurisdiction under 28 U.S.C. 1291 over the district court orders in the *Nixon* cases, but a court of appeals deciding an application for a certificate of appealability exercises jurisdiction based on Section 2253(c). That distinction, however, does not affect the conclusion whether there is a "case" in the court of appeals under Section 1254(1). The language of Section 1254(1) does not limit the power of review to "cases" arising under any particular jurisdictional authority; and the Court has relied on Section 1254(1) to review a court of appeals' decision denying mandamus, which a court of appeals has jurisdiction to issue not under Section 1291 but under Section 1651(a). See *Schlagenhauf* v. *Holder*, 379 U.S. 104, 109 (1964). Cf. *McClellan* v. *Carland*, 217 U.S. 268, 277 (1910) (holding that the Act of March 3, 1891, ch. 517, 26 Stat. 826, a predecessor to Section 1254(1), which—unlike Section 1254(1)—restricted the Court's certiorari power to certain categories of cases in the courts of appeals, did not authorize the Court to review the denial by a court of appeals of a mandamus petition).

[10] See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 44 n.11 (7th ed. 1993) ("A would-be,

The Court's view of what constitutes a "case" for purposes of Section 1254(1) thus appears quite broad. Under that broad view, Section 1254(1) could be interpreted to authorize the Court's review, as a separate "case," of a court of appeals' decision denying a certificate, although that authority would not extend to review of the merits of the underlying motion that the court of appeals denied permission to appeal.

That interpretation of Section 1254(1) may find further support in the acknowledged power of the Court under Section 1254(1) to decide whether a court of appeals has properly dismissed a case for lack of jurisdiction. See *Nixon* v. *Fitzgerald*, 457 U.S. at 743 & n.23; note 6, *supra*. The decision by a court of appeals whether to grant a certificate of appealability is functionally equivalent to a decision whether it has jurisdiction to consider the merits of the underlying appeal. There is, however, a distinction between the two situations in form, if not in function, and that distinction may justify treating the two situations differently. By requiring a prisoner to obtain a certificate of appealability in order to authorize an appeal from denial of a habeas petition or Section 2255 motion, Congress has established a two-stage procedure for the appeal, the first stage of which is in essence a

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but unsuccessful, intervenor * * * is considered to be a 'party' to the intervention matter before the court of appeals."). See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (per curiam) (explaining that the Court has certiorari jurisdiction under Section 1254(1) to review an order denying a motion to intervene and holding that, unless the Court reviews and reverses the order, the party denied intervention cannot obtain review under Section 1254(1) of issues presented in the underlying case).

screening process. Unless the prisoner passes that first-stage screen, it may be fair to conclude that Congress did not intend the prisoner's case to be "in" the court of appeals in any sense. In other types of appeals, however, threshold screening is not generally required, so the filing of the notice of appeal itself may be sufficient to lodge the case "in" the court of appeals.

2. In any event, this Court rejected jurisdiction under Section 1254(1) to review a certificate authorizing appeal in *House* v. *Mayo*, *supra*. In *House*, the Court explained that it could not issue a statutory writ of certiorari under a predecessor to Section 1254(1) because the case "was never 'in' the court of appeals, for want of a certificate of probable cause." 324 U.S. at 44. For that proposition, the Court cited *Ferguson* v. *District of Columbia*, 270 U.S. 633 (1926) (per curiam), in which the Court denied "for want of jurisdiction in this [C]ourt" a petition for a statutory writ of certiorari to review the refusal of a Justice of the Court of Appeals of the District of Columbia to allow a writ of error to the Police Court of the District. *Id.* at 634. The Court in *House* noted that, despite the unavailability of a statutory writ, "[b]y virtue of [the All Writs Act] we may grant a writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it." 324 U.S. at 44. Only at that point in its analysis did the Court go on to note: "And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, it extends also to questions on the merits sought to be raised by the appeal." *Id.* at 44-45. Thus, *House* holds that the Court must rely on the All Writs Act to review the denial of a certificate.

The Court viewed *House* as another in a group of cases in which it had used the common-law writ of certiorari to review decisions by appellate courts declining to allow appeals. See 324 U.S. at 44. The first of those cases, *In re 620 Church Street Bldg. Corp.*, 299 U.S. 24, 26 (1936), involved the denial of leave to appeal in a bankruptcy proceeding. Significantly, in that case, the Court reviewed only the decision of the court of appeals denying leave to appeal and not the merits of the underlying case. And, in that case, as in *House*, the Court held that it lacked jurisdiction to issue a statutory writ of certiorari. See 299 U.S. at 26.

The other cases on which the Court relied in *House* involved decisions by courts of appeals denying requests for leave to appeal in forma pauperis (IFP). See *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); *Wells* v. *United States*, 318 U.S. 257 (1943); *Steffler* v. *United States*, 319 U.S. 38 (1943). In one of those cases as well, the Court reviewed only the decision of the court of appeals denying leave to appeal and not the merits of the underlying case. See *Wells*, *supra*.[11]

Some of the cases decided since *House* seem to confirm that Section 1254(1) does not provide jurisdiction

[11] In *Holiday* and *Steffler*, the Court expressly noted that it had jurisdiction under the All Writs Act and considered not only the denial of leave to appeal IFP but also the merits of the appeal. See *Holiday*, 313 U.S. at 348-354 & n.2; *Steffler*, 319 U.S. at 39-41. In *Wells*, the Court neither discussed the basis for its jurisdiction nor the merits of the appeal. Before granting the petition for certiorari in *Wells*, however, the Court granted a motion for leave to file the petition, a procedural step indicating reliance on the common-law writ. See 317 U.S. 616 (1942); Sup. Ct. R. 31.1 (1979) (requiring motion for leave to file extraordinary writs) (repealed by 1980 revisions).

to review the denial of a certificate granting leave to appeal. In *Maxwell* v. *Bishop*, *supra*, the Court relied on the All Writs Act when it reversed the denial of a certificate of probable cause without passing on the merits of the underlying habeas petition.[12] And the opinions of Justices Rehnquist and Stevens in *Davis* and *Jeffries* appear to accept the proposition that statutory certiorari is not available to review action on an application for a certificate. See *Davis*, 454 U.S. at 912 (Stevens, J., respecting the denial of certiorari); *id.* at 916-917 (Rehnquist, J., dissenting from the denial of certiorari); *Jeffries*, 453 U.S. at 915-916 (Rehnquist, J., dissenting from the denial of certiorari).

3. Many of the cases decided since *House*, however, raise some doubt whether the Court has adhered to the view that it lacks jurisdiction under Section 1254(1) to review the denial of a certificate. In some cases in which the courts of appeals denied certificates, this Court did not discuss the basis for its jurisdiction and failed to follow its rule requiring it to grant leave to file before accepting a petition for common-law certiorari, see Sup. Ct. R. 31.1 (1979) (re-

[12] The Court did not state the basis for its jurisdiction, but its reliance on the common-law writ is clear from its grant of a motion for leave to file the petition for certiorari. *Maxwell*, 385 U.S. at 650; see note 11, *supra*. Several of the later IFP cases also clearly relied on the common-law writ, even though the Court did not grant a motion for leave to file the petition. See *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 336 (1948) (citing *Steffler*, *supra*); *Sentner* v. *United States*, 348 U.S. 935 (1955) (per curiam) (citing *Adkins*, *supra*). See also *Pollard* v. *United States*, 350 U.S. 965 (1956) (order granting petition for certiorari), opinion issued, 352 U.S. 354, 358 & n.2 (1957) (citing *Wells*, *supra*, but also reviewing the merits of the underlying appeal).

pealed by 1980 revisions).[13] The Court acted similarly in many of the later cases in which it reviewed denials of leave to appeal IFP.[14] In cases after 1980, the Court

[13] See, *e.g.*, *Burwell* v. *Teets*, *supra*; *Rogers* v. *Teets*, *supra*; *United States ex rel. Jennings* v. *Ragen*, *supra*; *In re Shuttlesworth*, *supra*; *Walker* v. *Wainwright*, *supra*; *Conway* v. *California Adult Auth.*, *supra* (order granting petition for certiorari); *Humphrey* v. *Cady*, 401 U.S. 973 (1971) (same); *Smith* v. *Digmon*, *supra*.

[14] See, *e.g.*, *Carafas* v. *LaVallee*, 389 U.S. 896 (1967) (order granting petition for certiorari), opinion issued, 391 U.S. 234, 241 (1968); *Nowakowski* v. *Maroney*, 384 U.S. 984 (1966) (order granting petition for certiorari), opinion issued, 386 U.S. 542, 543 (1967) (per curiam); *Ragan* v. *Cox*, 369 U.S. 437 (1962) (per curiam); *Coppedge* v. *United States*, 366 U.S. 959 (1961) (order granting petition for certiorari), opinion issued, 369 U.S. 438, 452 (1962); *Simcox* v. *Madigan*, 366 U.S. 765 (1961) (per curiam); *Lurk* v. *United States*, 365 U.S. 802 (order granting petition for certiorari), opinion issued, 366 U.S. 712 (1961) (per curiam); *Douglas* v. *Green*, 363 U.S. 192, 193 (1960) (per curiam); *Willis* v. *United States*, 362 U.S. 216 (1960) (per curiam); *McAbee* v. *United States*, 361 U.S. 537 (1960) (per curiam); *Smith* v. *United States*, 361 U.S. 38 (1959) (per curiam); *Smith* v. *United States*, 361 U.S. 13 (1959) (per curiam); *Page* v. *United States*, 359 U.S. 116 (1959) (per curiam); *Kitchens* v. *United States*, 358 U.S. 42 (1958) (per curiam); *Hansford* v. *United States*, 357 U.S. 578 (1958) (per curiam); *Cash* v. *United States*, 357 U.S. 219 (1958) (per curiam); *Hill* v. *United States*, 356 U.S. 704 (1958) (per curiam); *Ellis* v. *United States*, 356 U.S. 674, 675 (1958) (per curiam); *Edwards* v. *United States*, 355 U.S. 36 (1957) (per curiam); *Delbridge* v. *United States*, 354 U.S. 906 (1957) (per curiam); *Farley* v. *United States*, 354 U.S. 521, 522 (1957) (per curiam); *Johnson* v. *United States*, 352 U.S. 565, 566 (1957) (per curiam). The apparent shift from common-law to statutory certiorari in the IFP cases may reflect the change in appellate procedure from a system requiring an application for allowance of an appeal, see 28 U.S.C. 230 (1940) (cited in *Steffler*, 319 U.S. at 40), to a system requiring only the filing of a notice of appeal, see Fed. R. Civ. P. 73(a) (1952) (superseding Section 230). See D. Oaks, *The "Original" Writ of Habeas Corpus*, 1962 Sup. Ct. Rev. 153, 186 n.151. The Court, however, continued to use common-law certiorari even after that change. See, *e.g.*, *Pollard*, 352 U.S. at 358 n.2 (citing *Wells* to explain basis for the Court's jurisdiction).

was silent on the basis for its jurisdiction, which is surprising if the Court was relying on an extraordinary writ under the All Writs Act.[15]

Finally, in *In re Burwell*, *supra*, the Court commented on three questions certified by the Ninth

[15] See, *e.g.*, *Allen* v. *Hardy*, *supra*; *Graham* v. *Lynaugh*, *supra*; *Selvage* v. *Lynaugh*, *supra* (order granting petition for certiorari); *Lozada* v. *Deeds*, *supra*; *Lynce* v. *Mathis*, 116 S. Ct. 1671 (1996) (order granting petition for certiorari). In at least four of those cases, the petitioner invoked the Court's jurisdiction under Section 1254(1). See Pet. at 2, *Allen* v. *Hardy*, No. 85-6593; Pet. at 1, *Graham* v. *Lynaugh*, No. 88-5792; Pet. Br. at 1, 1989 WL 435477, at *1, *Selvage* v. *Lynaugh*, No. 87-6700; Pet. Br. at 1, 1996 WL 419841, at *1, *Lynce* v. *Mathis*, No. 95-7452.

In *Lynce*, as well as in several of the cases cited in notes 13 and 14, *supra*, the Court also addressed the merits of the underlying appeal. See, *e.g.*, *In re Shuttlesworth*, *supra*; *Humphrey*, 405 U.S. at 506; *Smith* v. *Digmon*, 434 U.S. at 333-334; *Douglas* v. *Green*, *supra*. That action does not necessarily demonstrate, however, that the Court relied on All Writs Act jurisdiction rather than Section 1254(1). It may be that the Court first exercised its jurisdiction under Section 1254(1) to review and reverse the court of appeals' denial of leave to appeal. Upon reversal of the court of appeals' decision on that issue, the underlying case itself was properly in the court of appeals, and therefore the Court could have exercised Section 1254(1) jurisdiction to decide the merits. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. at 743 n.23 (declining, in the interest of judicial economy, to remand after reversing court of appeals' dismissal of interlocutory appeal for lack of jurisdiction and instead reaching the merits).

Circuit during its consideration of Burwell's application for a certificate of probable cause. The Court's jurisdiction to consider certified questions could only have rested on 28 U.S.C. 1254(3) (1952), which, like Section 1254(1), was dependent on the existence of a "case[] in the court[] of appeals." Although the Court ultimately dismissed the certificates, see Sup. Ct. R. 19.3, it did so not because there was no case in the court of appeals but because it had already answered two of the questions and the answer to the third lay in the discretion of the court of appeals. See *In re Burwell*, 350 U.S. at 522; 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4038, at 112 & n.34 (2d ed. 1996).

In none of those cases, however, did the Court explicitly analyze whether or on what basis it had jurisdiction. Therefore, the cases should not be read to have reversed the ruling in *House* that jurisdiction to review the denial of a certificate rests not on Section 1254(1) but on the All Writs Act. See *Hagans* v. *Lavine* 415 U.S. 528, 535 n.5 (1974) (explaining that, "when questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

C. All Writs Act Principles Justify The Use Of Common-Law Certiorari To Review Denials Of Certificates Of Appealability In Appropriate Cases

The All Writs Act authorizes this Court to issue extraordinary or common-law writs when (1) "necessary or appropriate in aid of [its] jurisdiction[]" and (2) "agreeable to the usages and principles of law." See 28 U.S.C. 1651(a). Using a common-law writ of certiorari to review the court of appeals' denial to

petitioner of a certificate of appealability is fully consistent with that authorization.

Although "sparingly exercised," *Parr* v. *United States*, 351 U.S. 513, 520 (1956), this Court's power under the All Writs Act is quite broad. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) ("The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court."). This Court is "slow to reach a conclusion which would deprive the [C]ourt of the power to issue the [common-law] writ [of certiorari] in proper cases to review the action of the Federal courts inferior in jurisdiction to this [C]ourt." *McClellan* v. *Carland*, 217 U.S. 268, 279 (1910). "The suggestion, therefore, that this case should be dismissed for want of power in this [C]ourt to grant the writ of certiorari cannot be entertained." *Ibid.*

1. *If review of the order of the court of appeals is unavailable under Section 1254(1), resort to a common-law writ of certiorari is "necessary" "in aid of" this Court's appellate jurisdiction*

A common-law writ of certiorari to review the court of appeals' denial of petitioner's application for a certificate of appealability is necessary in aid of this Court's appellate jurisdiction.[16] Issuance of a writ in

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[16] Issuance of extraordinary writs to the courts of appeals is a constitutionally permissible exercise of this Court's appellate power under Article III. See, *e.g.*, *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 193 (1831) ("mandamus to an inferior court of the United States[] is in the nature of appellate jurisdiction"). See also *Felker* v. *Turpin*, 116 S. Ct. at 2339 (treating consideration of original writ of habeas corpus in this Court as an exercise of appellate jurisdiction); *id.* at 2341 n.1 (Souter, J., concurring) (explaining that habeas petition, although filed in the first

this case is necessary both to prevent unauthorized action by the court of appeals from precluding the Court's exercise of its appellate function and to enable the Court to supervise the courts of appeals in their application of Section 2253(c).

"[W]here a case is within the appellate jurisdiction of the higher court [an extraordinary writ] may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." *McClellan*, 217 U.S. at 280. Thus, "this [C]ourt ha[s] the power to issue [an extraordinary writ] to compel the Circuit Courts to proceed to final judgment in order that this [C]ourt may exercise the jurisdiction of review given by law." *Ibid.* See, *e.g.*, *Ex parte United States*, 287 U.S. 241, 246 (1932) (mandamus to require a district court to issue a bench warrant); *Ex parte Kawato*, 317 U.S. 69, 71 (1942) (mandamus to require a district court to allow Japanese resident alien to prosecute libel in admiralty). If the court of appeals erroneously denied petitioner a certificate of appealability, this Court would be wrongfully precluded from exercising, at a later point in the proceedings, its statutory certiorari power to review the merits of petitioner's Section 2255 motion.[17]

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instance in this Court, is "nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction"). Cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175 (1803) (the "essential criterion of appellate jurisdiction [is] that it revises and corrects the proceedings in a cause already instituted, and does not create that cause").

[17] See *Ex parte Abdu*, 247 U.S. 27, 28 (1918) (Court has power to use extraordinary writ to review decision by court of appeals refusing to file appeal unless appellant prepays costs because of "[t]he existence of the ultimate discretionary power here to review the cause on its merits and the deterrent influence which the refusal to file must have upon the practical exertion of that power").

A common-law writ of certiorari is also necessary in cases such as petitioner's to enable this Court to conduct its appellate function of supervising the courts of appeals. Cf. *La Buy*, 352 U.S. at 259-260 ("supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system"). Cf. Sup. Ct. R. 10(a) (noting that need for "an exercise of this Court's supervisory power" is a reason for granting certiorari).[18] Extraordinary writs may be used to correct a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383 (1953), particularly one that involves a court's refusal to exercise its jurisdiction, *La Buy*, 352 U.S. at 257. Although this Court will not issue mandamus unless the petitioner shows a "clear and indisputable" right to the writ, see, *e.g.*, *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam), the Court does not require a similar showing before issuing common-law certiorari.[19] As discussed at pages 21-23, *supra*, this Court has frequently used the common-

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[18] See also *Schlagenhauf* v. *Holder*, *supra*; *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940) (per curiam); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701 (1927).

[19] Cf. *United States* v. *Dickinson*, 213 U.S. 92, 93 (1909) (declining to allow the government to use common-law writ of certiorari to obtain review of a court of appeals' decision reversing a criminal conviction, and noting that the writ may not be used for "correction of mere error"); *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945) (All Writs Act can "not be availed of to correct a mere error in the exercise of conceded judicial power").

law writ of certiorari to supervise the courts of appeals in cases involving the denial of leave to appeal. Those cases have not always involved a "clear abuse of discretion," as is demonstrated by the fact that, in several of the cases, this Court ultimately affirmed the court of appeals. See, *e.g.*, *In re 620 Church Street Bldg. Corp.*, *supra* (using common-law writ of certiorari to review and affirm denial of leave to appeal in bankruptcy); *Wells* v. *United States*, *supra* (same with respect to denial by court of appeals of leave to appeal in forma pauperis). See also *Allen* v. *Hardy*, *supra* (using writ of certiorari to review and affirm denial of certificate of probable cause).

A common-law writ of certiorari is necessary in this case to correct the erroneous application by the court of appeals of the standard prescribed by Section 2253(c)(2) for issuing certificates of appealability. If the error in this case goes uncorrected, the court of appeals might improperly refuse to perform its appellate function to review habeas petitions and Section 2255 motions. And, if this Court lacks the power to correct the error made by the court of appeals here, it presumably also lacks the power to correct a court of appeals that interprets or applies Section 2253(c) in violation of equal protection or other fundamental constitutional principles.

Finally, use of a common-law writ of certiorari is necessary to enable the Court to ensure uniformity in how the different circuits interpret the standard for issuance of certificates of appealability. Cf. *Forsyth* v. *City of Hammond*, 166 U.S. 506, 512 (1897) ("Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.")

Indeed, the Court previously found it necessary to ensure uniformity in the standards used by the courts of appeals to decide applications for certificates of probable cause. See, *e.g.*, *Lozada* v. *Deeds*, 498 U.S. at 432 (concluding that the court of appeals had erred in applying the standards set forth in *Barefoot* v. *Estelle*, 463 U.S. 880, 892-893 (1983), for issuance of a certificate, and noting that two other courts of appeals would have decided the question differently); *Lynce* v. *Mathis*, 117 S. Ct. at 893 (granting certiorari to review the Eleventh Circuit's denial of a certificate "[b]ecause the Court of Appeals for the 10th Circuit reached a different conclusion on similar facts" on the merits of the issue petitioner sought to raise).

Admittedly, a Circuit Justice or this Court as a whole could grant petitioner a certificate of appealability. See *Davis*, 454 U.S. at 913 (Stevens, J., respecting the denial of certiorari); *id.* at 918 (Rehnquist, J., dissenting from the denial of certiorari); § 102, 110 Stat. 1217, 28 U.S.C. 2253(c)(1) (Supp. II 1996) (authorizing "circuit justice" to grant certificate); *In re Burwell*, *supra* (holding that authorization of circuit "judge" to grant certificate empowered court of appeals to grant one).[20] That authority does

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[20] See also *Autry* v. *Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., granting certificate of probable cause after court of appeals had denied it); *Anderson* v. *Collins*, 495 U.S. 943 (1990) (denying application for certificate presented to individual Justice and referred to Court, although two Justices would have granted the application); *O'Rear* v. *Attorney General of Wisconsin*, 484 U.S. 1078 (1988) (denying application presented to individual Justice and referred to Court); *Thomas* v. *Wainwright*, 475 U.S. 1113 (1986) (same); *In re Hunt*, 348 U.S. 968 (1955) (denying application); *Rosoto* v. *Warden*, 83 S. Ct.

not mean, however, that use of a common-law writ of certiorari is not "necessary" in aid of this Court's appellate jurisdiction. A writ is "necessary" in aid of jurisdiction not only if "the [C]ourt could not otherwise physically discharge its appellate duties." See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942). Its use must only be "reasonably necessary in the interest of justice." *Id.* at 274; *Price* v. *Johnston*, 334 U.S. 266, 279 (1948). Common-law certiorari is necessary in this case because an original application for a certificate of appealability would be a clumsy and burdensome means to preserve the potential to review the merits of petitioner's Section 2255 motion or to supervise the interpretation by the courts of appeals of the standard for issuing certificates.[21] Passing on petitioner's application would

1788, 1789-1790 (1963) (memorandum of Harlan, J., denying application).

[21] Even if an extraordinary writ were not "necessary" in aid of the Court's jurisdiction, a writ is certainly "appropriate" here. The Court's power to use common-law writs when "appropriate" as well as when "necessary" was clarified by the Act of June 25, 1948, ch. 646, § 1651(a), 62 Stat. 944. That Act consolidated various existing provisions governing use of the common-law writs into Section 1651 and made "necessary changes in phraseology," apparently without intending substantive change. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A144 (1947). The House Report does state, however, that the revised section is "expressive of the construction recently placed upon [the All Writs Act] in *U.S. Alkali Export Assn.* v. [*United States*, 325 U.S. 196 (1945)], and *De Beers Consol. Mines* v. [*United States, supra*]." *Id.* at A145. Those cases reaffirmed the general principle that the All Writs Act may not be used to allow review, particularly interlocutory review, in the face of plain legislative intent to preclude it. In both, however, the Court permitted interlocutory review even though not otherwise authorized by statute and even though

demand far more of this Court's resources than using common-law certiorari to clarify the proper standard for use by the court of appeals. The Court would have to resolve many legal and factual issues that it would not otherwise face. Those issues include whether the certificate requirement applies to Section 2255 motions pending in district court but not in the court of appeals when the AEDPA was enacted, whether petitioner procedurally defaulted on his claim and, if so, whether he has shown cause and prejudice to excuse that default, whether the jury instructions at petitioner's trial on the meaning of "carries" under 18 U.S.C. 924(c)(1) were correct, and whether petitioner's conduct constituted "carr[ying]" under that statute.[22] Thus, use of the common-law writ of certio-

appeal following final judgment was available. Thus, the addition of the word "appropriate" may signify congressional approval of review using the All Writs Act even when review is available in another form, such as through an original application in this Court for a certificate of appealability.

As a prudential matter, this Court has also limited use of the extraordinary writs to cases in which "no other remedy will suffice," *DiBella* v. *United States*, 369 U.S. 121, 125 n.4 (1962), and "'circumstances imperatively demand[]' a departure from the ordinary remedy," *Whitney* v. *Dick*, 202 U.S. 132, 140 (1906). See Sup. Ct. R. 20.1. Those standards, however, are not limitations on this Court's jurisdiction. In any event, the discussion at pages 27-31, *supra*, explaining why use of an extraordinary writ is "necessary" and the Court's repeated use of certiorari to review refusals by the circuit courts to permit appeals, see pages 21-23, *supra*, demonstrate that the prudential standards are met in petitioner's case.

[22] Petitioner might also be able to petition for a writ of habeas corpus under 28 U.S.C. 2241. Petitioner would first have to demonstrate, however, that a motion under Section 2255 "is inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255. In any event, using a petition for habeas corpus

rari to review the denial by the court of appeals of the certificate of appealability in this case is "necessary" "in aid of" the Court's appellate jurisdiction.

2. *Use of a common-law writ of certiorari is "agreeable to the usages and principles of law"*

Use of the common-law writ of certiorari in this case is not only necessary in aid of this Court's jurisdiction but is "agreeable to the usages and principles of law." In determining whether a particular writ is "agreeable to the usages and principles of law," this Court looks first to the common law. See *United States* v. *Hayman*, 342 U.S. 205, 221 n.35 (1952). The relief available using a particular writ is not confined to the precise forms or uses of the writ at common law before enactment of the All Writs Act but depends on the "usages and principles which have attached themselves to the writ * * * down through the years to the present time." See *Price* v. *Johnston*, 334 U.S. at 282-283.

As early as 1897, this Court held that it "can undoubtedly issue writs of certiorari in all proper cases" under the authority of the All Writs Act. See *In re Chetwood*, 165 U.S. 443, 462 (1897). See also *Whitney* v. *Dick*, 202 U.S. 132, 138 (1906) ("It may be said that the power of this court to issue original and

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as the vehicle to ensure that the courts of appeals are properly interpreting the standard for issuing certificates of appealability would be as cumbersome as using an original application for a certificate. The Court has already exhibited a preference for continued use of certiorari, rather than habeas corpus, to review denials of certificates authorizing an appeal. See, *e.g.*, *In re Shuttlesworth*, 369 U.S. at 35 (treating application for habeas corpus as a petition for certiorari to review circuit judge's denial of certificate of probable cause, granting certiorari, vacating, and remanding to district court).

independent writs of certiorari has been upheld under the authority given by" the All Writs Act). That power is explicitly recognized in the current rules of this Court. See Sup. Ct. R. 20.6 (referring to common-law writs of certiorari).

Like the other extraordinary writs, the common-law writ of certiorari has traditionally been used "to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so." See *U.S. Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202 (1945). See, *e.g.*, *In re Chetwood*, 165 U.S. at 462 (using common-law writ of certiorari to prevent circuit court from requiring dismissal of writ of error pending in this Court); *Whitney* v. *Dick*, 202 U.S. at 135 (using common-law certiorari to review the propriety of the use by a court of appeals of the writs of habeas corpus and certiorari to reverse a district court criminal conviction).[23]

As discussed above, pages 21-23, *supra*, this Court has repeatedly used the common-law writ of certiorari to require the courts of appeals to entertain appeals that they have refused to allow. See, *e.g.*, *House* v. *Mayo*, *supra*; *Holiday* v. *Johnston*, *supra*. The Court has also used the common-law writ of certiorari to correct legal errors in decisions of the

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[23] See also *Ex parte Crane*, 30 U.S. (5 Pet.) at 193 (Court had power to issue mandamus to order a circuit court to sign bill of exceptions); *Ex parte Bradstreet*, 32 U.S. (7. Pet.) 634, 648 (1833) (mandamus to district court that improperly refused to take a case to trial); *Insurance Co.* v. *Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873) (mandamus may be issued to compel a circuit court to decide an appeal in bankruptcy); *Ex parte Simons*, 247 U.S. 231, 240 (1918) (mandamus to require district court to allow jury trial of suit to enforce a promised bequest).

courts of appeals and district courts when other means of review would not provide an adequate remedy. See, *e.g.*, *De Beers Consol. Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945); *McClellan* v. *Carland*, *supra*; *Whitney* v. *Dick*, *supra*; *In re Chetwood*, *supra*. See also *Far East Conference* v. *United States*, 342 U.S. 570 (1952). Those are the precise functions for which the writ would be exercised in this case.

Use of the writ to review the order by the court of appeals in this case does not conflict with the principle established in *United States* v. *Beatty*, 232 U.S. 463, 467-468 (1914), that the writ cannot be used as a substitute for an authorized appeal when one is available. If the Court adheres to its precedent precluding review under Section 1254(1), the order of the court of appeals denying petitioner a certificate of appealability would not be reviewable except by use of an extraordinary writ. As discussed above, pages 31-34, *supra*, an original application for a certificate in this Court would not be an adequate substitute for direct review of the order.

Nor does use of the common-law writ conflict with the related principle that the All Writs Act should not ordinarily be used to permit review in the face of a plain legislative purpose to preclude review. See, *e.g.*, *Roche*, 319 U.S. at 27-28. This Court's precedent is clear that the lack of statutory certiorari power under Section 1254(1) does not preclude the exercise of jurisdiction under the All Writs Act. See, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 585 n.4 (1943) (the express grant of statutory certiorari jurisdiction in the Judiciary Act of 1925, the predecessor to Section 1254(1), did not curtail this Court's power to issue common-law writs); *In re 620 Church Street*

Bldg. Corp., 299 U.S. at 26; *McClellan*, 217 U.S. at 277. In *House* v. *Mayo*, 324 U.S. at 44, the Court explicitly held that common-law certiorari was available to review the denial of a certificate of probable cause, despite the fact that Section 2253 prevented an appeal on the merits absent a certificate. And, as discussed above, pages 12-15, *supra*, when Congress extended the certificate requirement to federal prisoners like petitioner, it made no changes to Section 2253 to alter the well established rule that this Court could use the common-law writ to review the denial of a certificate by a court of appeals. Nor is Section 2253's denial of appellate review as of right on the merits of a Section 2255 motion at all inconsistent with this Court's discretionary review of the ruling of a court of appeals on whether to grant an appeal.[24]

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[24] The certificate requirement has its origins in a congressional desire to limit certain frivolous habeas corpus cases. See *Jeffries*, 453 U.S. at 916 (Rehnquist, J., dissenting from denial of certiorari) (citing H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908)). The continued availability of common-law certiorari, however, should not overburden the Court or respondents by increasing the resources spent on review of frivolous habeas petitions and Section 2255 motions. The Court need not review the merits of the underlying petitions and motions and may limit review of the decision whether to grant a certificate to cases such as this one, in which the legal standard applied to deny a certificate was erroneous. In most cases, the Court will easily determine, without need for a response to the petition, that the petitioner has not made the extraordinary showing required for a writ. Finally, eliminating certiorari review would not likely reduce the burden on the Court because petitioners could reformulate their requests for review as original applications for certificates of appealability or original petitions for habeas corpus.

This Court's decisions in *U.S. Alkali*, *supra*, and *De Beers*, *supra*, are not inconsistent with use of the common-law writ in this case. Indeed, they support its use here. In those cases, the petitioners sought interlocutory review of questions arising under a statute that provided for direct appeal to this Court but did not provide for interlocutory appeals. The Court noted in *U.S. Alkali* that use of the common-law writ would generally be inappropriate under those circumstances because of the plain intent to preclude review on appeal. See 325 U.S. at 203. In both cases, however, the Court allowed review because the petitioners alleged that the district court had exceeded its jurisdiction in a manner that could not adequately be corrected except by use of the common-law writ. See *id.* at 203-204; *De Beers*, 325 U.S. at 217. Unlike *U.S. Alkali* and *De Beers*, this case poses no threat to the final judgment rule. Nor, as discussed above, is there any indication here of congressional intent to preclude this Court's review. Finally, review is justified for reasons parallel to those justifying review in the earlier cases: The court of appeals here has refused to exercise its jurisdiction in a manner that cannot be corrected other than by use of the common-law writ.[25]

Finally, this Court's jurisdiction to grant a common-law writ of certiorari is not defeated by peti-

[25] In any event, the principle against use of extraordinary writs to circumvent restrictions on interlocutory appeals that was reaffirmed in *U.S. Alkali* and *De Beers* appears to be prudential rather than jurisdictional. See *La Buy*, 352 U.S. at 255 ("Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them.").

tioner's failure specifically to request such a writ. If the Court has jurisdiction over a case, the Court may review it, even if the parties incorrectly state in their papers filed with the Court the basis of the Court's jurisdiction. Indeed, the Court recognized that principle in *House* v. *Mayo*, *supra*, and granted common-law certiorari even though the petitioner had invoked this Court's statutory certiorari jurisdiction. See also *In re 620 Church Street Bldg. Corp.*, *supra* (granting common-law writ of certiorari to review denial by court of appeals of leave to appeal when petitioner had invoked statutory certiorari jurisdiction); *In re Shuttlesworth*, *supra* (treating application for habeas corpus as a petition for certiorari to review circuit judge's denial of certificate of probable cause, granting certiorari, vacating, and remanding to district court); note 15, *supra*. Indeed, this Court regularly exercises jurisdiction over cases on a different basis than that invoked by the party seeking review. See *Davis*, 454 U.S. at 914 n.3 (Stevens, J., respecting the denial of certiorari) ("We do follow the practice in handling our appellate docket of treating appeals that are improperly taken as though they had been filed as petitions for certiorari and then denying them"). See, *e.g.*, *Head* v. *California*, 374 U.S. 509 (1963) (per curiam) (treating request for writ of common-law certiorari as request for writ of statutory certiorari, granting writ, and vacating and remanding for further consideration); *Barefoot* v. *Estelle*, 463 U.S. at 887 (treating application for a stay of execution as a petition for certiorari).

CONCLUSION

The Court has jurisdiction to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand for further consideration.

Respectfully submitted.

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APPENDIX

1. Section 230 of Title 28, United States Code (1940), provided:

> No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

2. Section 347(a) of Title 28, United States Code (1940), provided:

> (a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal.

3. Section 377 of Title 28, United States Code (1940), provided:

> The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

4. Section 1254(1) of Title 28, United States Code, provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

5. Section 1254 of Title 28, United States Code (1952), provided in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
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> * * * * *
>
> (3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

6. Section 1651(a) of Title 28, United States Code, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective

> jurisdictions and agreeable to the usages and principles of law.

7. Section 2241(a) of Title 28, Unites States Code, provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

8. Section 2244 of Title 28, United States Code (Supp. II 1996), provides in relevant part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b) * * *
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> * * * * *
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> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
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> * * * * *

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

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9. Section 2253(c) of Title 28, United States Code (Supp. II 1996), provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

10. Section 2253 of Title 28, United States Code (1994), provided in relevant part:*

* * * * *

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

11. Section 2255 of Title 28, United States Code, provides in relevant part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

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* The language in the 1952 version of the Code, in effect at the time of the decision in *In re Burwell*, 350 U.S. 521 (1956), was identical to the 1994 version.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

12. Federal Rule of Appellate Procedure 22(b) provides:**

> **(b) Certificate of Appealability.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit

** Although the rule as written applies only to habeas petitions by state prisoners, the failure to refer to motions under 28 U.S.C. 2255 by federal prisoners appears to be an oversight. A proposed revision to the rule that would make explicit its application to Section 2255 motions is currently pending before this Court.

judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

13. Federal Rule of Civil Procedure 73(a) (1952) provided in relevant part:

> A party may appeal from a judgment by filing with the district court a notice of appeal.

14. Supreme Court Rule 19.3 provides:***

> When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

15. Supreme Court Rule 20.1 provides:

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To

*** A predecessor version of this provision, Sup. Ct. R. 29.2 (1954), which similarly provided for the possibility of dismissal of a certificate following a preliminary examination, was in effect at the time of *In re Burwell*, 350 U.S. 521 (1956).

justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

16. Supreme Court Rule 20.6 provides:

> If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

17. Supreme Court Rule 31.1 (1979) provided in relevant part:****

> The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U.S.C. § 1651(a) or 28 U.S.C. § 2241 shall be prefaced by a motion for leave to file such a petition, and both shall be printed.

**** This provision came into effect in 1954. See Sup. Ct. R. 31.1 (1954).